

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27647-3-III

Respondent,

Division Three

v.

RANDALL C. WISE,

Appellant.

UNPUBLISHED OPINION

Sweeney, J. — The defendant in this case was convicted of four counts of felony harassment (threat to kill) and one count of misdemeanor harassment. He challenges the information, the sufficiency of the evidence, many of the trial court’s evidentiary rulings, its denial of his suppression motion, its choice of jury instructions, and its investigation of an allegation of juror misconduct. He contends the trial court violated the appearance of fairness doctrine and his right to a public trial. We find no error and affirm the convictions.

FACTS

In August 2005, the Riverside School District’s school board held a public meeting

to determine whether to retain the high school's baseball coach, Ron Davis, because of allegations that he mistreated his players.

Randall Wise attended the meeting because he had a son in high school sports. Mr. Wise wanted Coach Davis fired. So did his friend, Stacey Paul. His friends, Dan and Janie McMahon, wanted to retain the coach. His friends, John Paul and Scott Robinson, were members of the school board. The school board ultimately voted to affirm the decision to retain Coach Davis.

Mr. Wise was angry and left the meeting after the vote. He yelled at the high school's football coach, Alan Martin, in the hallway outside the meeting room.

Mr. Wise's friendships with the McMahons, the Pauls, and Mr. Robinson ended because of their disagreement over whether to retain Coach Davis. Mr. Wise later rebuffed Mr. McMahon's attempt to reconcile publicly at a football game in the fall of 2006. And he cussed at Mr. McMahon and challenged him to a fistfight in December 2006. Mr. McMahon told his wife about the latter incident.

On May 30, 2007, Mr. Wise heard that Coach Davis had mistreated the son of friends Rick and Pam Mead. Mr. Wise responded to this news by making five phone calls. He called Ms. McMahon, got Mr. McMahon's phone number, and told Ms. McMahon:

"Well, you need to know your husband's buddy, Ron Davis, is going after Colton Mead, and I'm not going to let him . . . mess up Colton's life like he

did my son. I'm going to take care of this, and you need to spread the word out there that I'm going to take care of this, and you need to know you're 50 percent of this because you're 50 percent of your husband, and I'm going to take care of this situation soon."

Report of Proceedings (RP) (Nov. 4, 2008) at 203. Then he called Mr. McMahon and left the following voicemail:

"Hey, little piece of shit. Your budd[y] done messed with Colton Mead. I swear, I will not stand by and watch you screw with another kid like you did mine. And you're going to be just as much at fault for everything that's going to happen in the near future, Buddy. I'm telling you right now, it is a long ways from straight. Save this message. You will need it."

RP (Nov. 5, 2008) at 406. Mr. Wise also called the Paul home and told Ms. Paul he was going to take care of her husband:

He got really mad and started yelling and cussing at me and screaming at me and telling me how horrible John [Paul] was, and that Ron Davis – he's done with Ron Davis F'ing with all these children, Colton Mead in particular. He held my husband personally responsible for that.

He then went on to say that he's been working his ass off for the last 18 months to get himself out of debt so that his wife would have no worries, and that he could take care of my husband.

. . . .

. . . I was originally just kind of dumbfounded that he would say anything like that, and I just kind of went, "What are you talking about, Randy? What do you mean," and he goes, "You know exactly what I mean. You're a big girl. Figure it out," and then he continued to cuss me out, and I just hung the phone up.

RP (Nov. 3, 2008) at 57. Mr. Wise called Mr. Paul next and left the following voicemail:

"John Paul, your little buddy Davis is messing with Colton Mead and I'm holding you responsible and I'm willing to take it to the most extent I can take it. You need to know, you little son of a bitch, piece of

shit that when I deal with you, that you would be big way. You need to know that, Buddy. You record this and you save it for court. It will help your ass. You hear me. Save this for court, you little piece of shit, slimy faggot, little piece of crap. Take it back, pieces of shit, and they're still fucking with people. And I have done – my son is graduating in a week and I'm dealing with you, you little worm. You are a worm."

RP (Nov. 5, 2008) at 408-09. Finally, Mr. Wise called Mr. Robinson and, according to Mr. Robinson, Mr. Wise said the following:

Basically, he started off with derogatory remarks about me, . . . you fat son of a bitch, that kind of stuff and said that Ron Davis was messing with Colton Mead again, and he had always considered me exempt, but no longer. He now considered me to be responsible right along with John Paul and Dan McMahon, and I said, "Exempt? What's that about?" He said, . . . "You were always kind of on the side line and not real active, so I always considered you exempt, but no more," and he said, "Now I'm holding you responsible," and I said, . . . "Well, are you threatening me," and he said, "Yes, I am," . . . and he said, "Listen. I'm tired of going to meetings. I'm tired of writing letters. I'm tired of making phone calls. I'm taking care of this myself," and he said, "If you want to report this call, I have a plan to go below you," and I said, "When you say[] that Randy, are you talking about my wife and kids?" He said, "You're a smart guy. Figure it out."

. . . He said, "Listen you fat son of a bitch. I'm giving you three seconds to hang up and get me off of speaker phone," . . . He said, "Three, two, one. You are no longer exempt," and he hung up.

RP (Nov. 4, 2008) at 164-65.

Mr. Robinson's friend, Sheriff Bob Bond, recommended that Mr. Robinson call 911 and report the calls. Mr. Robinson did so.

Deputy Alan Rollins arrested Mr. Wise for harassment a few days later. The

deputy told Mr. Wise he was not going to ask him any questions. Mr. Wise then asked Deputy Rollins what harassment meant. Deputy Rollins said harassment included threats. And Mr. Wise stated that he had not harassed anyone and that he made “some phone calls the other night” but did not threaten to kill anyone. He said, “[T]hey are scared because they know they did me wrong.” RP (Nov. 5, 2008) at 313.

Detective David Skogen spoke to Mr. Wise at the jail the next day. He asked Mr. Wise if he would like to talk. Mr. Wise told him “he got a bottle and called three people” but did not threaten anyone. RP (Nov. 4, 2008) at 233-34.

The State charged Mr. Wise with five counts of harassment. Each count of the charging information alleged that Mr. Wise “did, without lawful authority, knowingly threaten to cause bodily injury immediately or in the future by threatening to kill [the person threatened] or any other person, and the defendant’s words or conduct placed [the person threatened] in reasonable fear that the threat would be carried out.” Clerk’s Papers (CP) at 51-52.

Mr. Wise moved unsuccessfully to suppress the statements he made to Deputy Rollins and Detective Skogen. A jury then heard testimony about the events surrounding the phone calls. It also heard testimony about the victims’ reactions and responses to the calls. It ultimately found Mr. Wise guilty of four counts of felony harassment (threat to kill) and one count of misdemeanor harassment.

Mr. Wise appeals. ■

DISCUSSION

Motion to Suppress Statements

Mr. Wise argues that the trial court should have suppressed the statements he made to Deputy Rollins and Detective Skogen because his statements were responses to police interrogation and he was not properly informed of his *Miranda*¹ rights. The State contends Mr. Wise's statements were not the product of police interrogation and, therefore, were admissible.

The trial court's CrR 3.5 findings of fact are unchallenged and, therefore, verities on appeal. *State v. O'Neill*, 110 Wn. App. 604, 607, 43 P.3d 522 (2002). Our review, then, is limited to determining whether the findings support the trial court's conclusions of law. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Statements to Deputy Rollins

After Deputy Rollins arrested Mr. Wise, he said he was not going to ask any questions and told Mr. Wise that he had a right to an attorney and that his statements could be used against him. Mr. Wise then asked the deputy to define harassment. Deputy Rollins answered Mr. Wise's question by stating that harassment includes threats. Mr. Wise then said he called people but did not threaten to kill them. He also said,

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

“‘They’re scared because they know they did me wrong.’” RP (Aug. 21, 2008) at 10.

Statements that are wholly unsolicited or in response to words not likely to solicit incriminating information are admissible even in the absence of *Miranda* warnings. *State v. Eldred*, 76 Wn.2d 443, 448, 457 P.2d 540 (1969). Interrogation includes “‘any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992) (alteration in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

Deputy Rollins’ response to Mr. Wise’s question was reasonable. It did not implicitly or explicitly call for a response from Mr. Wise. The statements were unsolicited and admissible without *Miranda* warnings. *Eldred*, 76 Wn.2d at 448.

Statements to Detective Skogen

Detective Skogen told Mr. Wise that he wanted to know more about the incident that resulted in his arrest but reassured Mr. Wise that he did not have to talk. Mr. Wise said he wanted to talk. So Detective Skogen and Mr. Wise took an elevator to the interview room. Mr. Wise told the detective his wife had called an attorney. The detective said that he was entitled to an attorney and that he could call his wife and his attorney from the interview room before they talked. Mr. Wise then told Detective Skogen that he did not threaten to kill anyone, that people with whom he had a three-year dispute were causing problems for another

kid, and that he got a bottle and called three people but did not threaten to kill anyone. Detective Skogen then escorted Mr. Wise from the elevator to the interview room. Mr. Wise called his attorney who advised Mr. Wise not to talk. The detective then escorted Mr. Wise back to jail.

The trial court properly concluded that Mr. Wise volunteered the statements he made to Detective Skogen. The detective did not interrogate Mr. Wise. He told Mr. Wise he could call his attorney as soon as they got to the interview room before they talked. These words were certainly not calculated to elicit a response. Mr. Wise's unsolicited statements, then, were properly admitted despite the absence of *Miranda* warnings. *Id.*

Other Evidentiary Rulings

Mr. Wise next challenges a number of the court's rulings on evidence. We review evidentiary rulings for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009).

Prior Bad Acts

Mr. Wise contends that the trial court erred by admitting six prior bad acts: (1) his 2005 confrontation with the football coach, (2) his verbal confrontation with Mr. McMahon in December 2006, (3) his refusal to shake Mr. McMahon's hand in public as a symbol of friendship, (4) his police escort from Riverside football field after allegedly violating a pretrial restraining order, (5) his

alleged comment that Mr. Paul's son played poorly, and (6) his comment to Steve Bland in spring 2007 that he could understand how a person can get mad enough to kill someone.

"The decision to admit evidence of [prior bad acts] will not be disturbed on appeal absent an abuse of discretion." *State v. Burkins*, 94 Wn. App. 677, 687, 973 P.2d 15 (1999). "But the trial court must: (1) find . . . that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice." *Id.*

Mr. Wise concedes that prior bad acts may be admitted to prove a victim's reasonable fear in a harassment case. *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). But he argues that these six acts did not tend to show that the victims here reasonably feared that he would carry out his alleged threats.

Mr. Wise did not object to the admission of acts (3), (4), and (5) on ER 404(b) grounds. *See* RP (Nov. 4, 2008) at 150, 243-45. His failure to make a timely and specific objection at the trial court level precludes appellate review of the admissibility of these acts. ER 103(a)(1).

The State moved in limine to admit acts (1), (2), and (6) as evidence that the victims reasonably feared that Mr. Wise would carry out his threats. Mr. Wise objected. And the trial court analyzed each act under

ER 404(b) as required. *Burkins*, 94 Wn. App. at 687. It stated that the purpose of the evidence was to show reasonable fear. And it found that the acts occurred, were relevant to proving reasonable fear, and were not so temporally remote as to be unfairly prejudicial. Specifically, the court found that anyone who witnessed Mr. Wise's heated arguments with the football coach or Mr. McMahon or heard of his comment to Mr. Bland might have reason to fear a subsequent threat made by Mr. Wise. And it found that the victims here witnessed or knew of some or all three of these acts. Indeed, evidence that a victim knows of specific prior bad acts by the defendant is relevant to the reasonable fear element of harassment and outweighs the acts' prejudicial effect. *Barragan*, 102 Wn. App. at 759. The trial court's decision to admit acts (1), (2), and (6) was, therefore, based on tenable grounds.

Questions by the Prosecutor

Mr. Wise contends the trial court erred by allowing the prosecutor to ask Mr. McMahon leading questions about the date he learned of Mr. Wise's comment to Mr. Bland. Mr. Wise did not object to the questions. *See* RP (Aug. 21, 2008) at 60; RP (Nov. 4, 2008) at 246. He has, therefore, waived the error. *State v. Barber*, 38 Wn. App. 758, 770, 689 P.2d 1099 (1984).

He also argues that the trial court erred by allowing the prosecutor to exceed the scope of direct examination by asking Mr. Davis questions about Ms. McMahon's alleged fear. Mr. Wise asked Mr. Davis on direct

examination whether he knew Mr. Wise allegedly made threatening phone calls. Mr. Davis answered affirmatively. The State on cross-examination then asked Mr. Davis if Ms. McMahon called him to discuss the alleged threats, if she was afraid, and if he went to see her. Mr. Wise objected that the questions went beyond the scope of direct examination. Cross-examination is generally limited to the scope of the direct examination. *State v. Hobbs*, 13 Wn. App. 866, 868, 538 P.2d 838 (1975). But a trial court has great discretion in setting the scope of cross-examination. *Id.* The questions asked of Mr. Davis on cross-examination did not clearly exceed the scope of direct examination. They clarified how and why Mr. Davis found out about Mr. Wise's alleged threats and how he responded to them. There was no abuse of discretion.

Impeachment Testimony

Mr. Wise claims that the trial court erroneously excluded evidence impeaching the victims' claims of fear. He argues the court did not allow him to admit testimony that Mr. Robinson told Randy Kummer, a school board member, that he was "going after" Mr. Wise. Br. of Appellant at 46 (citing RP (Nov. 4, 2008) at 193; RP (Nov. 5, 2008) at 431). The court, however, ruled that it would allow such testimony. RP (Nov. 4, 2008) at 109. And Mr. Wise asked Mr. Robinson if he told Mr. Kummer and Mr. Mead he was going to "stick it" to Mr. Wise. RP (Nov. 4, 2008) at 192-93. Mr. Robinson said, "No." *Id.* There is, then, no error here; Mr. Wise's attempt to introduce impeachment evidence

merely failed.

He also says the court did not allow Ms. Mead to testify that Ms. Paul said she and the other victims would drop the charges if Mr. Wise apologized. The record Mr. Wise cites for support, however, does not show he attempted to admit such testimony. RP (Nov. 5, 2008) at 342-43. There is, then, nothing for us to review.

Mr. Wise further asserts that the court erred by excluding, as irrelevant, evidence that the victims were afraid in August 2005 that Mr. Wise would sue them. He suggests that the evidence would have shown the victims did not reasonably fear his threats and would have explained why they pressed charges against him. Relevant evidence is any evidence that increases or decreases the likelihood that a material fact (e.g., reasonable fear) exists. ER 401. Whether or not the victims knew Mr. Wise wanted to sue them in August 2005 does not tend to decrease the likelihood that they reasonably feared that Mr. Wise would carry out threats he made more than two years later. Moreover, the trial court specifically allowed Mr. Wise “to ask the alleged victims if they made their complaint to the police because of an intention to deflect a threat of a lawsuit.” RP (Nov. 4, 2008) at 109. The trial court, then, did not exclude the evidence; it permitted it.

Mr. Wise contends the court erred by excluding the last few minutes of a videotaped recording of the August 2005 board meeting. He does not cite to the place in the record where the trial court excluded the evidence. We, therefore, cannot review whether the court’s ruling was an abuse of

discretion. The court probably did not err in any event. The recording would have been cumulative evidence of his allegation that he did not yell at the football coach, Coach Martin; Mr. Kummer testified that he did not hear Mr. Wise yelling at Coach Martin. And the recording would have been irrelevant to show that Mr. Robinson did not fear Mr. Wise's threat, as Mr. Wise suggests, because he had not yet threatened Mr. Robinson.

He also argues that the trial court should have allowed him to testify that Mr. Robinson had a niece and treated her like a daughter but allowed her to visit the Wise home after Mr. Wise threatened Mr. Robinson. He maintains the evidence would have shown that Mr. Robinson did not reasonably fear his threat. There is no ruling to review, however, because Mr. Wise has not shown that he actually tried to admit this testimony. *See* RP (Nov. 5, 2008) at 362-63.

Mr. Wise next complains that the trial court erred by refusing to allow him to explain his reasoning for his prior bad acts in an effort to impeach Mr. McMahon's claim of reasonable fear and to show that a reasonable person in his shoes would not have foreseen that his threats would be taken seriously. His reasons, however, were not relevant to the reasonable fear issue. "It is a well recognized and firmly established rule . . . that a witness cannot be impeached upon matters collateral to the principal issues being tried." *State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). Mr. Wise's subjective reasons for his prior bad acts and the phone calls do not decrease the likelihood that a reasonable person in his

situation would foresee that his threats would be taken seriously. Moreover, the record shows that the phone calls were a response to ongoing problems with high school athletics. There was sufficient context for the phone calls without Mr. Wise's proposed testimony.

Irrelevant Evidence

He asserts the court erred by admitting testimony that Ms. McMahon was afraid of Mr. Wise because their sons had fought. But he did not object to the testimony at trial. RP (Nov. 4, 2008) at 206. Mr. Wise has waived the alleged error. *Barber*, 38 Wn. App. at 770.

Hearsay

Mr. Wise claims the court erroneously admitted hearsay when Mr. Robinson testified that Sheriff Bond recommended calling 911 to report the threats. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. ER 801, 802. The statement here was not offered to prove that Sheriff Bond made a recommendation. It was offered to show why Mr. Robinson called 911. The testimony, then, was not hearsay. *See State v. Chambers*, 134 Wn. App. 853, 858-59, 142 P.3d 668 (2006). And the trial court did not abuse its discretion by admitting it.

Exculpatory Evidence

Mr. Wise argues that the court should have admitted testimony that he did not leave the house after making the phone

calls but began preparing his civil suit for filing. Indeed, the court let Mr. Wise's son testify that Mr. Wise did not leave the house after making the calls. RP (Nov. 5, 2008) at 353. It sustained the State's objection to testimony that Mr. Wise prepared his civil suit for filing after making the phone calls. RP (Nov. 5, 2008) at 353, 359-60. But Mr. Wise did not challenge the ruling; there is, then, no record for us to review the trial court's reason for excluding the testimony. The decision was addressed to the discretion of the trial court in any event. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). And Mr. Wise has not shown that the court abused its discretion.

Jury Instructions

We review de novo alleged errors of law in jury instructions. *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Jury instructions must allow the parties to argue their theories of the case, must not mislead the jury, and, when taken as a whole, must properly inform the jury of the law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

True Threat

Mr. Wise contends that the trial court did not properly instruct the jury on "true threat." He argues that the court should have instructed the jury that a "true threat" (1) requires the jury to consider the alleged threat from the speaker's perspective, (2) does not include puffery, and (3) must be found *before* the jury can find the speaker guilty of

harassment.

“[A] jury in a criminal harassment prosecution . . . must be instructed on the concept of ‘true threat.’” *State v. Schaler*, 145 Wn. App. 628, 640, 186 P.3d 1170 (2008), *review granted*, 165 Wn.2d 1015 (2009). “A ‘true threat’ is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (alteration in original) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). “Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.” *Id.* at 44.

Mr. Wise argues that the instructions given here were confusing because they told the jury to “focus on the speaker” without further elaboration. But jury instruction 10 informed the jury that it had to consider the alleged threats from Mr. Wise’s perspective as *Kilburn* requires:

A “true” threat is a statement made in a context or under such circumstances wherein *a reasonable person making such statement* would objectively foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm or to take the life of another individual.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker.

A true threat is a serious threat, not one said in jest, idle talk, or

political argument.

CP at 289 (emphasis added). Mr. Wise then complains that jury instruction 10 did not tell the jury that the State had to prove he *subjectively* knew he was communicating a threat to cause bodily injury to someone. But that instruction did not have to because other jury instructions did so. Jury instruction 7 defined harassment as requiring proof that Mr. Wise *knowingly threatened* to cause bodily injury to another person:

A person commits the crime of harassment when he or she, without lawful authority, *knowingly threatens* to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

CP at 286 (emphasis added). The instructions defined “knowingly” and “threaten” as:

A person knows or acts knowingly . . . when he . . . is aware of a fact.

CP at 287 (Jury Instruction 8).

Threat[en] means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

CP at 288 (Jury Instruction 9). When considered as a whole, then, the jury instructions here adequately informed the jury that it had to determine whether Mr. Wise subjectively knew he was communicating the intent to cause another bodily injury and whether a reasonable person in *his* shoes could foresee that his statements would be taken seriously.

Mr. Wise next asserts that jury instruction 10 should have advised jurors that a “true threat” does not include “puffery.”

He says the court's failure to so instruct the jury prevented him from arguing his defense.

Puffery, indeed, is not a true threat. *Kilburn*, 151 Wn.2d at 43, 46; *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001). And jury instruction 10 did not advise the jury that a true threat does not include puffery. Neither *Kilburn* nor *J.M.*, however, requires that the State prove or that a jury be instructed to specifically find that a statement is not puffery. The jury need only find that Mr. Wise made a true threat. *Kilburn*, 151 Wn.2d at 47. Moreover, Mr. Wise's defense was that his statements were political argument, not that they were puffery. *See* RP (Nov. 3, 2008) at 49-50; RP (Nov. 6, 2008) at 496-527 (Mr. Wise's opening statement and closing argument). And jury instruction 10 explicitly told the jury that political argument is not a true threat. Jury instruction 10, then, did not prevent Mr. Wise from arguing his theory of the case.

Mr. Wise further argues that the jury should have been instructed that it was required to find that Mr. Wise made a "true threat" *before* it could find him guilty of harassment. The elements instructions here did just that:

To convict [Mr. Wise] of the crime of harassment . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) *That on or about May 30, 2007, [Mr. Wise] knowingly threatened to cause bodily injury immediately or in the future to [the person threatened]; and*

. . . .

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP at 291-95 (Jury Instructions 12-16)

(emphasis added). Considering the instruction defining “true threat,” discussed above, the trial court’s elements instructions adequately informed the jury that it was required to find a true threat before returning a guilty verdict. Moreover, jury instruction 17 and the special verdict forms guaranteed, in part, that this finding had been made properly:

If you find [Mr. Wise] guilty of harassment, you will complete the special verdict form provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict. If you find the defendant not guilty of harassment, do not use the special verdict form.

If you find that the State has proved beyond a reasonable doubt that [Mr. Wise’s] threat to cause bodily harm was a “true threat” and that the defendant’s threat to cause bodily harm was a threat to kill the person threatened or another person, it will be your duty to answer the special verdict “yes”.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that [Mr. Wise’s] threat to cause bodily harm was a threat to kill the person threatened or another person, it will be your duty to answer the special verdict “no”.

Additionally, if, after weighing all of the evidence, you have a reasonable doubt that [Mr. Wise’s] threat to cause bodily harm was a “true threat”, it will be your duty to answer the special verdict “no”.

CP at 296 (Jury Instruction 17) (emphasis added);

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF HARASSMENT.

We, the jury return a special verdict by answering as follows:

Was [Mr. Wise’s] threat to cause bodily harm:

- (a) a “true threat” and;
- (b) did it consist of a threat to kill the person threatened or another person?

ANSWER: _____
(Yes or No)

CP at 300, 302, 304, 306, 308 (special

verdicts).

The trial court, then, properly instructed the jury on the concept of “true threat” and advised the jury that it had to find that Mr. Wise made a “true threat” before it could find him guilty of harassment.

Special Verdict—Misdemeanor Harassment

Mr. Wise next contends that his conviction for misdemeanor harassment cannot stand because misdemeanor harassment requires proof of a true threat and the jury found by special verdict that his threat toward Mr. McMahon was *not* a true threat and a threat to kill.

The special verdict on this count shows the jury found that Mr. Wise’s threat was a true threat but not a threat to kill. The trial court instructed the jury that it had to answer the special verdict “no” if it doubted that Mr. Wise’s threat was a threat to kill:

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that [Mr. Wise’s] threat to cause bodily harm was a threat to kill the person threatened or another person, it will be your duty to answer the special verdict “no”.

CP at 296 (Jury Instruction 17). We presume the jury followed this instruction. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). By answering the special verdict with a “no,” then, the jury communicated only that Mr. Wise did not threaten to kill Mr. McMahon or another in the voicemail he left Mr. McMahon. The instructions

accommodated the misdemeanor harassment conviction.

Information and “To Convict” Instructions

Mr. Wise also contends that a true threat is an essential element of the crime of felony harassment (threat to kill) and must be alleged in an information and included in an elements instruction. We review the adequacy of elements instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

“No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or ‘to convict’ instruction.” *State v. Tellez*, 141 Wn. App. 479, 483, 170 P.3d 75 (2007). “So long as the court defines a ‘true threat’ for the jury, the defendant’s First Amendment rights will be protected.” *Id.* at 484. We have already concluded that the trial court here properly defined “true threat” for the jury. The information and elements instructions, then, adequately set out the elements of these crimes.

Juror Misconduct

Mr. Wise also contends that the trial court did not sufficiently investigate an allegation of juror misconduct.

We review a trial court’s investigation of juror misconduct for abuse of discretion. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). A trial court abuses its discretion when its decision is manifestly

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unreasonable or based upon untenable grounds or reasons. *In re Parentage of I.A.D.*, 131 Wn. App. 207, 218-19, 126 P.3d 79 (2006).

Tammy Hebert testified that she saw the jury in a sandwich shop before deliberations and heard three members of the jury comment that the defense witnesses had not been allowed to talk. She identified the three jurors for the court. And she said she could not be sure whether other jurors were involved.

The trial court and counsel questioned the identified jurors separately at Mr. Wise's request. Each juror denied discussing the case in the sandwich shop. The trial court then denied Mr. Wise's motion for a mistrial because it found no misconduct:

Counsel, there has been a thorough interview, supplemental voir dire of the three identified jurors as Ms. Hebert did identify them as having discussed matters pertaining to the case.

The Court is satisfied that there was no such discussion. The Court further recalls the requirement that jurors as part of their oath are presumed to follow the Court's instructions, and it would appear, indeed, in this matter that they have followed the Court's instructions with respect to not discussing the case and keeping their minds open and restricting any discussions about their obligations to the jury deliberation . . . room.

So I respectfully deny the Motion for Mistrial.

RP (Nov. 7, 2008) at 564.

Mr. Wise says the trial court should have questioned every juror, not just the three identified jurors. But he asked the court to question only the three identified jurors. So he cannot assign error to the court's procedure here on appeal. *State v. Phelps*, 113 Wn.

App. 347, 353, 57 P.3d 624 (2002). And the court held a hearing and questioned the three jurors accused of discussing the case. All three denied that they discussed the case. Their testimony supports the court's finding that no misconduct occurred and the finding supports the court's decision to deny the motion for mistrial.

Trial Court Bias—Appearance of Fairness

Mr. Wise contends the trial court demonstrated actual or potential bias by (1) making evidentiary rulings in favor of the State and against him, (2) informing the prosecutor that it expected him to object to certain questions by the defense and then sustaining the objections even though objections were not made, (3) refusing to consider his legal arguments on proposed jury instructions, and (4) giving a special verdict jury instruction that he suspects was offered by the State ex parte.

The question is “whether a reasonably prudent and disinterested observer would conclude Mr. [Wise] obtained a fair, impartial, and neutral trial.” *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996).

“For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge.” *In re Application of Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961).

The trial court's evidentiary rulings were appropriate. The special verdict forms were proper. The trial court sustained

anticipated objections to questions posed by defense counsel because the questions violated the court's rulings on evidence and pretrial orders:

During trial there was a pattern of continuous repetitive questions posed by defense counsel which were contrary to and violated the court's ruling on various motions in limine and previously sustained objections by the State. When this pattern occurred, the court sustained an objection by the State when the prosecutor began to rise, apparently with the intent to object. The court wanted to avoid the necessity to admonish or rebuke defense counsel based on defense counsel's conduct. The court would have entertained such a request by the State based on defense counsel's repetitive conduct of ignoring the court's rulings. The court was concerned that if it admonished or rebuked defense counsel in front of the jury this might improperly comment to the jury in regard to defense counsel and in turn the defendant.

CP at 400. The court's actions on the State's anticipated objections were appropriate.

Finally, the record does not support Mr. Wise's claim that the court failed to consider his arguments on jury instructions. The court heard and considered his objections to the jury instructions. RP (Nov. 6, 2008) at 461-68.

Mr. Wise has failed to show that the trial court here was potentially or actually biased, nor is there the appearance of unfairness.

Sufficiency of the Evidence

Mr. Wise next contends that the evidence is not sufficient to show that he communicated true threats to the five victims and that they reasonably feared he would carry out the threats. The challenge requires that we consider the evidence in a light most favorable to the State and ask whether it was sufficient to show that Mr. Wise's statements were "true threats" and that the

victims reasonably feared them. *Kilburn*, 151 Wn.2d at 52; *State v. Kiehl*, 128 Wn. App. 88, 94, 113 P.3d 528 (2005).

Felony Harassment—True Threat

For purposes of felony harassment (threat to kill), “[a] ‘true threat’ is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to . . . take the life of another person.” *Id.* at 43 (second alteration in original) (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 207-08).

Mr. Wise argues that a reasonable person in his position would not have foreseen that his statements would be interpreted as threats to kill because he did not say he was going to kill anyone. He argues that his statements would be interpreted as only threats to sue because he threatened to sue the school board at the 2005 school board meeting. However, Mr. Wise did not explicitly tell the Pauls, Ms. McMahon, or Mr. Robinson during his phone calls to them that he was going to sue them. His threats were vague:

- “I’m going to take care of this.” RP (Nov. 4, 2008) at 203 (phone call to Ms. McMahon);
- “[I have] been working [my] ass off . . . to get [myself] out of debt so that [my] wife [will] have no worries[. I will] take care of [your] husband.” RP (Nov. 3, 2008) at 57 (phone call to Ms. Paul);
- “I’m holding you responsible and

I’m willing to take it to the most extent I can take it. . . . [M]y son is graduating in a week and I’m dealing with you, you little worm.” RP (Nov. 5, 2008) at 409 (phone call to Mr. Paul);

- “I’m holding you responsible . . . I’m taking care of this myself . . . If you want to report this call, I have a plan to go below you.” RP (Nov. 4, 2008) at 164-65 (phone call to Mr. Robinson).

A person can *indirectly* threaten to kill another. *Kilburn*, 151 Wn.2d at 48. And a reasonable person in Mr. Wise’s shoes would know that. These statements, then, when combined with Mr. Wise’s increasingly violent behavior—his 2005 confrontation with Coach Martin and his 2006 confrontation with Mr. McMahon—and his hostile relationships with the victims, would cause a reasonable person in Mr. Wise’s position to foresee that the victims would interpret his statements as indirect threats to kill.

Sufficient evidence in the record establishes that Mr. Wise communicated true threats.

Felony Harassment—Reasonable Fear

Harassment requires the person threatened to subjectively feel fear that the threat will be carried out and that the fear is reasonable. RCW 9A.46.020(1)(b); *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002). Here, all victims testified that Mr. Wise’s statements made them fear for their lives or someone else’s life; they all subjectively feared Mr. Wise’s threats. RP (Nov. 3, 2008) at 58; RP (Nov. 4, 2008) at 124-25, 166, 204. And they all kept watch for Mr. Wise

and took safety precautions after hearing the threats, including learning self-defense, obtaining concealed weapons permits, carrying and upgrading handguns, sleeping with a loaded shotgun under the bed, teaching their children to use handguns, setting alarms, setting up escape plans and warning plans, and avoiding places where Mr. Wise might go.

And their fear was reasonable under the circumstances. Each victim knew Mr. Wise personally. They each had a friendship with Mr. Wise that ended badly because of a disagreement over a high school baseball coach. Ms. McMahon knew Mr. Wise had guns and that he had challenged her husband to a fistfight a few months earlier. Ms. Paul saw him scream, yell, and cuss at Coach Martin after the board meeting. Mr. Robinson and Mr. Paul saw the confrontation with Coach Martin, too. Mr. Paul knew “how [Mr. Wise] approach[e]d conflict. Once he gets into a position where he gets his mind to it, . . . no rules, no guidelines will keep him from doing what he wants to do.” RP (Nov. 4, 2008) at 124. They did not, however, know Mr. Wise threatened to sue them at the board meeting. RP (Nov. 3, 2008) at 70; RP (Nov. 4, 2008) at 130, 181, 216.

There is, then, ample evidence to show that the victims reasonably feared that Mr. Wise would carry out threats to kill them.

Misdemeanor Harassment—True Threat and Reasonable Fear

Like felony harassment, misdemeanor harassment requires proof of a true threat. *See Kilburn*, 151 Wn.2d at 43 (holding that “RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only true threats”). It,

however, requires proof of a true threat to cause only bodily injury. RCW

9A.46.020(1)(a)(i). Again, a true threat, for purposes of misdemeanor harassment, is a statement that a reasonable speaker would foresee would be interpreted as a serious expression of the intent to inflict bodily harm upon another person. *Kilburn*, 151 Wn.2d at 43.

The jury could have found that a reasonable person in Mr. Wise's shoes would foresee that Mr. McMahon would take his voicemail seriously and that Mr. McMahon's fear was reasonable. Mr. Wise knew that he and Mr. McMahon were not friends, that their sons did not get along, that he told Mr. McMahon he was a suck-up, that he tried to coax Mr. McMahon into a fistfight six months earlier and then told him he would take care of him later when Mr. McMahon refused to fight. When put in context, the jury could have found that a reasonable speaker would expect that Mr. McMahon would take the voicemail as an expression of Mr. Wise's intent to physically injure Mr. McMahon or his family. It also could have found Mr. McMahon's fear reasonable under these circumstances. Moreover, Mr. McMahon testified that he was afraid Mr. Wise would carry out his threat and that he, like the others, took precautionary measures to protect himself and his family.

Substantial evidence supports all five convictions.

Public Trial

Mr. Wise next claims that

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mandatory searches at the Spokane County Courthouse doors unconstitutionally closed his trial to anyone who might refuse to consent to the search and that the trial court did not satisfy the necessary requirements for closing the courtroom. “Whether the right to a public trial has been violated is a question of law subject to de novo review.” *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

Article I, section 22 of the Washington Constitution guarantees all criminal defendants the right to a public trial. And article I, section 10 provides, “[j]ustice in all cases shall be administered openly.” The right to a public trial is not absolute, but “it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances.” *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006)).

Courthouse entry searches are permissible. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 324, 178 P.3d 995 (2008). These proceedings were not closed to the general public. The court simply exercised its discretion to protect litigants, witnesses, jurors, and others in the courtroom.

Cumulative Error

Mr. Wise asserts that cumulative error deprived him of a fair trial. There was no error here. There can be no cumulative error where there is no error at all. *In re Det. of Law*, 146 Wn. App. 28, 42, 204 P.3d 230 (2008).

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We affirm Mr. Wise's convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Kulik, C.J.

Brown, J.